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**BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF NEVADA**

In the Matter of Charges and Complaint) **CASE NO. 08-6001-1**
)
Against)
)
DIPAK KANTILAL DESAI, M.D.,)
)
Respondent.)

FILED

JUL 28 2009

NEVADA STATE BOARD OF
MEDICAL EXAMINERS

**ORDER SCHEDULING FOLLOW-UP STATUS CONFERENCE; REQUIRING
CONTINUING INTERIM REPORTING AND DOCUMENTATION OF ANY
SIGNIFICANT CHANGES IN THE MEDICAL CONDITION OF THE
RESPONDENT AS IT RELATES TO THE PREPARATION AND
PRESENTATION OF HIS ANSWER TO THE CHARGES AND COMPLAINT
ON FILE IN THESE ADMINISTRATIVE PROCEEDINGS AND IN REGARD
TO THE DISCOVERY PROCEEDINGS AND PARALLEL CIVIL AND
POTENTIAL CRIMINAL PROCEEDINGS; MAINTAINING PROHIBITION
OF THE PRACTICE OF MEDICINE UNTIL FURTHER ORDER; AND
MANDATING CALENDARING OF PRE-HEARING CONFERENCE AND
HEARING**

TO: LYN E. BEGGS, ESQ.

General Counsel

Attorney for the Investigative

Committee of the Nevada State

Board of Medical Examiners

1105 Terminal Way, Suite 301

Reno, Nevada 89502

Follow-Up Status Conference Date: 9:30 a.m.

July 28, 2009

KIM MANDELBAUM, ESQ.

MANDELBAUM & SCHWARZ, LTD.

Attorneys for Respondent Dr. Desai, M.D.

2012 Hamilton Lane

Las Vegas, Nevada 89106

THIS MATTER came before the undersigned Administrative Hearing Officer pursuant to the Order of the undersigned Administrative Hearing Officer confirming in writing the oral directive issued at the time of the Status Conference held on April 3, 2009 continuing that Status Conference until 9:30 a.m. on Tuesday, April 14, 2009 in order to provide the parties with an opportunity to receive and review the written report of Dr.

1 Thomas K. Kinsora, Pd.D., a Clinical Neuropsychologist and Specialist in Neurocognition, of
2 the Center For Applied Neuroscience.

3 At the time of the April 14, 2009 Status Conference the report of Dr. Kinsora was
4 reviewed, specifically in regard to Dr. Kinsora's account of his administration of a battery of
5 standard tests to assess the current ability of the Respondent to meaningfully participate in
6 the preparation and presentation of his answer to the malpractice charges currently pending
7 before this tribunal and that health care professional's finding, based on his examination and
8 evaluation of the Respondent, that the Respondent "would have difficulty assisting counsel
9 currently" in regard to the preparation and presentation to his answer to the malpractice
10 charges currently pending before this tribunal.

11 As noted in that earlier report, Dr. Kinsora proceeded to state that in order to
12 determine the extent and severity of the damage caused by the stroke suffered by the
13 Respondent in July 2008 he needed to access and evaluate additional medical records,
14 including access to the imaging performed at UCLA Medical Center at the time of the initial
15 treatment of the Respondent for his stroke. This examination would include current
16 imaging to examine the same area of the Respondent's brain as previously imaged at the
17 UCLA Medical Center. Dr. Kinsora noted that this examination and comparison would be
18 made in conjunction with a neuroradiologist and other health care professionals in order to
19 ascertain the nature and extent of any damage initially sustained and currently existing.

20 Dr. Kinsora further recommended in his April 2009 report and recommendation
21 that additional radiological testing be undertaken in regard to any other imaging deemed
22 necessary in order to assist in confirming the nature and extent of any impairment as it
23 relates to the ability of the Respondent to so assist and to provide a course of treatment and
24 time table for when – if ever – the Respondent could be anticipated to overcome such
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1 impairment to the extent necessary to be considered competent to answer the pending
2 malpractice charges.

3
4 Finally, Dr. Kinsora recommended in this earlier report that the Respondent be
5 referred to a clinical psychologist and speech and language pathologist for testing, evaluation
6 and course of treatment prescribed by such health care providers based on that referral.

7
8 During the course of the April 2009 proceedings legal counsel for the Investigative
9 Committee once again advised that the Investigative Committee and the Nevada State Board
10 of Medical Examiners, consistent with due process, wanted to proceed on this disciplinary
11 matter as soon as possible in order to protect the interests of the alleged victims and to
12 insure that the no further or additional harm to the public interest could occur based on the
13 Respondent's practice of medicine prior to the adjudication of the merits of the charges
14 currently pending.

15
16 In that regard, after discussions regarding a reasonable time frame for scheduling
17 the recommended additional evaluation and commencing the recommended therapy in an
18 effort to validate, and address, the additional findings of Dr. Kinsora and the need to move
19 forward with the resolution of the pending licensing matters based on the impact of any
20 long-term competency questions it was ordered that the additional testing and evaluation be
21 forthwith commenced and that a telephonic Status Conference to receive and review that
22 additional testing and assessment be scheduled for 9:30 a.m. on Tuesday, July 14, 2009.

23
24 At the time of the July 14, 2009 Status Conference the parties represented that Dr.
25 Kinsora had completed his additional testing and examination but had yet to finish his
26 written report in regard to his findings and recommendations based on that additional
27 assessment. In so stating, the parties represented to the undersigned Administrative Hearing
28 Officer that the written report was expected in the immediate future.

1
2 In discussing the timing of the receipt of the follow-up written report of Dr.
3 Kinsora the parties touched on the continued pendency of the final report by the Southern
4 Nevada Health District, hereinafter referred to as the "SNHD", regarding the cluster of
5 hepatitis C cases attributed to the alleged reusing of syringes that may have contaminated
6 medication vials used in treating patients at the Respondent's Southern Nevada Endoscopy
7 Center's Shadow Lane Clinic in Las Vegas, Nevada.

8
9 Approximately 18 months have elapsed since the filing of the initial report by the
10 SNHD from which investigation the current – and parallel – disciplinary actions of
11 physicians licensed by the Nevada State Board of Medical Examiners based on the alleged
12 acts and omissions to act in question flowed.

13 As a result of this investigation, civil tort litigation has been launched in the Eighth
14 Judicial District Court and possible criminal charges at the Federal and State level
15 considered, but as of yet not pursued.

16 Depositions of key witnesses for the SNHD spanning many days have occurred in
17 the civil litigation, including the deposing of Mr. Brian Labus and Dr. Sands, with the SNHD
18 seeking judicial intervention to block the use of the said depositions and the underlying
19 medical records and opinions flowing from those documents and determinations that
20 medical malpractice occurred.
21

22 The civil tort litigation has been subjected to protracted, and continuing, delays
23 flowing from a number of arguments, including the contention that (1) Many of the key
24 witnesses who would be called upon to testify in the civil litigation and these licensing
25 procedures, including other licensed physicians, CRNA's, PA's and nurses have asserted
26 their Fifth Amendment right not to testify substantively at the present time due to the
27 potential filing of criminal charges currently the subject of on-going investigations in Clark
28

1 County, Nevada; and (2) The continuing failure and/or refusal of the SNHD to provide its
2 key witnesses, Mr. Brian Labus and Dr. Sands, as well as their deposition transcripts and
3 investigative records for publication or use in the pending disciplinary and civil tort
4 litigations until the completion of the final investigative report of the SNHD.
5

6 This final report has not been filed and no anticipated date for the completion and
7 filing of the same has been announced. As noted in the civil proceedings pending in the
8 Eighth Judicial District Court cases, that agency's initial investigation and disclosure of the
9 Hepatitis C outbreak in Clark County, Nevada and the agency's witnesses and their
10 investigations, interviews, records, notes, testing, and other documents and evidence, "are at
11 the epicenter of this entire matter."
12

13 In this disciplinary matter and the parallel disciplinary proceedings pending against
14 other license physicians flowing from that initial investigation, General Counsel Beggs
15 echoed the representations of the attorneys for the Respondent the civil tort litigation in
16 regard to the position of the SNHD that the appearance and testimony of Mr. Labus and
17 Dr. Sands and access to the transcripts of said individuals' depositions and to the agency's
18 source investigative reports and the interviews and other documentary evidence compiled
19 during the course of the SNHD investigation of the Hepatitis C outbreak is unavailable for
20 use by either party to these disciplinary proceedings pending the completion and filing of the
21 final report by the SNHD.
22

23 The bulk of these private wrong-doing cases are currently being heard in
24 Department XIX of the Eighth Judicial District Court of the State of Nevada in Case No.
25 A558091 captioned "In the Matter of Endoscopy Center and Associated Businesses and
26 Coordinated cases".
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1
2 Previous rulings in these parallel civil cases have impacted the access of the
3 Defendants in those civil proceedings, and the Respondents in the pending licensing actions,
4 to the "investigation, interviews, records, notes, testing, and other documents and evidence"
5 obtained by the SNHD in connection with the charges in said licensing, civil and criminal
6 actions.

7 On April 6, 2009 District Judge Allan R. Earl signed a Decision and Order in the
8 civil actions, a copy of which ruling is attached hereto as Exhibit A and hereby incorporated
9 by reference.

10 This ruling was based on a discovery dispute between the SNHD and the
11 Endoscopy Center of Southern Nevada and the Gastroenterology Center of Nevada over
12 access to "every report, every document, and every shred of investigative evidence under the
13 control of the SNHD in order to prosecute and defend the various positions they are going
14 to take in this litigation"...and the "equally understandable reluctance [of the SNHD] to
15 simply open their investigative files for the parties to rummage through when those files
16 often contain confidential and sensitive information carrying a statutory
17 protection"...including documents "gathered under the promise of anonymity."

18 Earlier in this dispute currently pending before the Eighth Judicial District Court,
19 Special Master Floyd Hale stayed a subpoena by the Defendants in the civil litigation. After
20 various efforts to resolve the discovery dispute, on January 12, 2009 the Special Master
21 issued his "Special Master Report, Recommendation and District Court Order Regarding
22 Discovery Issues."

23 The April 6, 2009 Decision and Order by the District Court was subsequently
24 entered based on that Report and the Objections thereto filed by the Defendants and argued
25 by the parties to that civil litigation to District Judge Earl.
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1
2 The SNHD argued for a broad and far-ranging protective order limiting access to
3 its investigators and experts and to such investigative files and the other key personnel
4 collecting and evaluating such evidence.

5 The District Court held at pages 7-11, "After careful consideration, it is this
6 Court's Decision that the non-patient specific documents which the SNHD wishes to
7 withhold are indeed protected by the "Deliberative Process Privilege" so long as the final
8 report has not been finalized and released. This Court disagrees with the Special Master's
9 opinion that any documents relied on by the SNHD to produce an interim report or public
10 statements have lost whatever "Deliberative Process Privilege" they may once have held.
11 The documents in question, to this Court's satisfaction, are "pre-decisional and deliberative."

12 The District Court went on to state, "Any documents which the SNHD deems to
13 be pre-decisional, deliberative, pointing to an agency decision or report or policy, and
14 consisting of opinion, recommendation or advice about agency policies are protected and
15 need not be produced. Any non-patient specific documents that do not fall into one of
16 these categories and are not protected under other State and/or Federal Statutes must be
17 produced. As earlier stated, the SNHD is encouraged to protect only those documents that
18 are absolutely privileged and confidential. The Court also notes that the process of deciding
19 which documents will and will not fall under the "Deliberative Process Privilege" is
20 inherently disruptive and until the final report is produced and disseminated, the SNHD is
21 directed to not take any extraordinary measures to gather, review or catalogue them."
22 [Emphasis in original].
23
24

25 The District Court further stated, "The Court adopts the recommendation of the
26 Special Master that any documents produced by the SNHD should initially be produced and
27
28

1 sent to representative counsel for the Plaintiffs for review to allow Plaintiffs to assert any
2 privilege as to these documents prior to them being released to other parties.”

3
4 The SNHD has not indicated a time frame for the finalization and release of its
5 final report and has indicated its disagreement with the nature and scope of District Judge
6 Earl’s Decision and Order by virtue of its actions since the entry of said ruling wherein the
7 agency has designated the previous depositions of Mr. Labus and Dr. Sands as being entirely
8 under seal (after earlier indicating that only part of those depositions were sealed at the time
9 such deposition were given) and filing a writ with the Nevada Supreme Court challenging
10 that Decision and Order primarily based on the mandate that the investigative records would
11 be disclosed to all other interested individuals and institutions once the SNHD investigation
12 report was finalized and released. The hearing on that Writ is still pending before the
13 Nevada Supreme Court at the present time, with District Judge Earl scheduled to hear
14 further arguments in regard to this evidentiary quagmire on July 28, 2009.

15
16 In the interim since the closure of the July 14, 2009 Status Conference and the
17 drafting and entry of this Order, Dr. Kinsora has issued and served his “Assessment of
18 Neurocognitive Processing” in regard to the Respondent.

19
20 Based on the receipt of Dr. Kinsora’s report, a further telephonic Status
21 Conference is hereby scheduled to commence as of 9:30 o’clock a.m. on Tuesday, July 28,
22 2009 in order to review the report of Dr. Kinsora and to have the benefit of any additional
23 court actions in regarding to the gag orders concerning the disclosure and use of the SNHD
24 records and depositions.

25 This follow-up report is based on a follow-up MRI of the Respondent read by Dr.
26 William Orrison, M.D. of Nevada Imaging Center, consultation regarding the course of
27 treatment of the Respondent with Dr. Roitman, M.D., and additional clinical interviews and
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1 testing by Dr. Kinsora. Based on this multidisciplinary approach, Dr. Kinsora found that,
2 pursuant to NRS 178.400¹, the Respondent “does not seem to fulfill the first two criteria for
3 incompetency, and is in the borderline with regard to his ability to assist counsel. Thus, he is
4 clearly aware of the charges against him, has a good knowledge of the facts of the case and
5 understanding the role of all the keys players in the judicial system. While he is not clearly
6 ‘unable to assist counsel’, he can be considered ‘impaired in his ability to assist counsel’.”
7

8 In so opining, Dr. Kinsora proceeded to note that Respondent is “squarely on the
9 borderline with regard to his ability to assist counsel” and that, although “[a] sound
10 argument can be made either way”, the Respondent is in his opinion “likely acceptably
11 competent, but certainly not optimally competent”.
12

13 According to Dr. Kinsora, the current treatment of the Respondent may improve
14 his ability to assist legal counsel, but will in all likelihood not significantly improve over time.

15 Pending the interim actions by the Eighth Judicial District Court or the Nevada
16 Supreme Court in regard to the discovery dispute – and the filing of criminal charges [with
17 the potential granting of immunity from criminal prosecution to some of the witnesses to
18 the alleged acts and omission to act at the medical clinics in question] – the undersigned
19 Administrative Hearing Officer desires that the parties to this proceeding forthwith discuss
20 the calendaring of a date for the Pre-Hearing Conference and the Hearing date, which
21 calendared dates shall both be scheduled to be held at the earliest date mutually agreeable to
22 the parties, with the Pre-Hearing Conference to be scheduled before the end of the 2009
23

24
25 ¹ NRS 178.400 Incompetent person cannot be tried or adjudged to punishment for public offense.

- 26 1. A person may not be tried or adjudged for punishment for a public offense while he is incompetent.
27 2. For the purposes of this section, “incompetent” means that the person does not have the present ability
28 to:
(a) Understand the nature of the criminal charges against him;
(b) Understand the nature and purpose of the court proceedings; or
(c) Aid and assist his counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

1 calendar year and the Hearing to be thereafter scheduled as early in calendar year 2010 as
2 shall be available to both parties and the undersigned Administrative Hearing Officer. In the
3 event that the preparation for, and conduct of, either administrative proceeding is prevented
4 due to the inability of either party to utilize a relevant and material witness or evidence
5 needed to present, or answer, the charges set-forth in the Complaint on file herein, the party
6 making that assertion shall forthwith notify in writing the other party and the undersigned
7 Administrative Hearing Officer of that contention and schedule a timely hearing to present
8 and argue the assertion, including any court ruling(s) regarding the same.
9

10 Based on the foregoing premises and proceedings, and
11

12 GOOD CAUSE APPEARING THEREFORE,

13 IT IS HEREBY ORDERED that a telephonic Status Conference to review the
14 additional court development and course of treatment progress be scheduled to commence
15 at 9:30 o'clock a.m. on Tuesday, July 28, 2009.

16 IT IS FURTHER HEREBY ORDERED that pending the interim actions by the
17 Eighth Judicial District Court and/or the Nevada Supreme Court in regard to the discovery
18 dispute – and/or the filing of criminal charges [with the potential granting of immunity from
19 criminal prosecution to some of the witnesses to the alleged acts and omission to act at the
20 medical clinics in question] – the parties to this proceeding forthwith discuss the calendaring
21 of a date for the Pre-Hearing Conference and the Hearing date, which calendared dates shall
22 both be scheduled to be heard at the earliest date mutually agreeable to the parties, with the
23 Pre-Hearing Conference to be scheduled before the end of the 2009 calendar year and the
24 Hearing to be thereafter scheduled as early in calendar year 2010 as shall be available to both
25 parties and the undersigned Administrative Hearing Officer. In the event that the
26 preparation for, and conduct of, either administrative proceeding is prevented due to the
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28

1 inability of either party to utilize a relevant and material witness or evidence needed to
2 present, or answer, the charges set-forth in the Complaint on file herein, the party making
3 that assertion shall forthwith notify in writing the other party and the undersigned
4 Administrative Hearing Officer of that contention and schedule a timely hearing to present
5 and argue the assertion, including any court ruling(s) regarding the same. This consultation
6 and designation of suitable dates shall occur within 30 days of the date of this Order and will
7 be confirmed by further Order of this tribunal.
8

9 IT IS FURTHER HEREBY ORDERED that the parties to these proceedings
10 continue to timely and in good faith exchange any and all interim reports and medical
11 records indicating any significant change in the diagnosis, prognosis and course of treatment
12 of the Respondent as it relates to that ability to so assist as well as any inability to practice
13 medicine, as well as any pertinent deposition, documents or other discovery relevant to the
14 prosecution and defense of these administrative charges.
15

16 IT IS FINALLY HEREBY ORDERED that the previous order by the
17 undersigned Administrative Hearing Officer mandating that, until such time as the instant
18 Charges and Complaint is heard on its merits and a favorable decision of the State Board of
19 Medical Examiners is reached – or in the alternative – said charges are resolved by the
20 Stipulation of the parties, the Respondent shall not practice medicine within the State of
21 Nevada or engage in any acts or practices subject to licensure by the State Board of Medical
22 Examiners and that legal counsel for the parties timely and in good faith keep the
23 undersigned Administrative Hearing Officer advised in regard to any issue which has been
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resolved by negotiation or stipulation.

DATED this 27TH day of July 2009.



PATRICK D. DOLAN, ESQ., Hearing Officer
Nevada State Board of Medical Examiners
7980 Meadow Vista Court
Reno, Nevada 89511-1027
(775) 328-3323 Telephone (775) 852-7292 Facsimile
lawyerpoppy@sbcglobal.net

CERTIFICATE OF MAILING

I certify that on this day I personally delivered or mailed, postage prepaid, at Reno, Nevada, a true copy of the foregoing Order Scheduling Follow-Up Status Conference; Requiring Continuing Interim Reporting and Documentation of Any Significant Changes in the Medical Condition of the Respondent as it Relates to the Preparation and Presentation of His Answers to the Charges and Complaint these Administrative Proceedings and in Regard to the Discovery Proceedings and Parallel Civil and Potential Criminal Proceedings; Maintaining Prohibition of the Practice of Medicine Until Further Order; and Mandating the Calendaring of Pre-Hearing Conference and Hearing addressed to:

LYN E. BEGGS, ESQ.
General Counsel, Attorney for the Investigative
Committee of the Nevada State
Board of Medical Examiners
1105 Terminal Way, Suite 301
Reno, Nevada 89502

KIM MANDELBAUM, ESQ.
MANDELBAUM & SCHWARZ, LTD.
Attorneys for Respondent Dr. Desai, M.D.
2012 Hamilton Lane
Las Vegas, Nevada 89106

DATED this 28th day of July 2009.



Angelia L. Donohoe, Legal Assistant
Nevada State Board of Medical Examiners

EXHIBIT

A

ORIGINAL

Electronically Filed
04/07/2009 07:10:57 AM

Edna A. Smith
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of) Case No. A558091
Endoscopy Center and)
Associated Businesses) Department XIX
and Coordinated cases)

DECISION AND ORDER

SUMMARY OF FACTS

The issue presented to the District Court for Decision in this matter arises out of a discovery dispute between the Endoscopy Center of Southern Nevada and the Gastroenterology Center of Nevada, hereafter referred to as "Defendants", and the Southern Nevada Health District, hereinafter referred to by the initials "SNHD". The SNHD is an integral part of this coordinated litigation, is actively represented by counsel, but is not an actual party to the litigation. The Defendants, and the Plaintiffs for that matter, have an understandable desire to gain access to every report, every document, and every shred of investigative evidence under the control of the SNHD in order to prosecute and defend the various positions they are going to take in this litigation. The SNHD has an equally understandable

EXHIBIT A

ALLAN R. EARL
DISTRICT JUDGE

DEPARTMENT NINETEEN
LAS VEGAS NV 89155

1 reluctance to simply open their investigative files for the
2 parties to rummage through when those files often contain
3 confidential and sensitive information carrying a statutory
4 protection. Many documents appear to have been gathered under the
5 promise of anonymity.

6 The parties and the SNHD presented their conflict to the
7 Special Master, Floyd Hale, for consideration. Previously, the
8 Defendants, on May 28, 2008, had issued a broad-ranging Subpoena
9 to the SNHD. The Special Master stayed the Subpoena to allow the
10 parties concerned to attempt to resolve their discovery issues.
11 Much correspondence went back and forth between the Defendants
12 and the SNHD. Several hearings were held where the Defendants and
13 the SNHD tried to work out their discovery differences. A letter
14 dated August 5, 2008, on SNHD's letterhead, was generated by
15 counsel Stephen Minagil and addressed to Defendants' counsel
16 Daniel Curriden. This letter outlined the position of the SNHD
17 with respect to many documents desired by the Defendants. The
18 Defendants' position on the documents they desired to have
19 produced is best set forth in a December 4, 2008, letter generated
20 by defense counsel V. Andrew Cass, addressed to SNHD counsel Terry
21 Coffing and Lisa McClane. A telephone hearing was conducted by
22 the Special Master on January 8, 2009. As a direct result of that
23 hearing, the Special Master issued his Decision entitled "Special
24 Master Report, Recommendation and District Court Order Regarding
25 Discovery Issues." This Report was issued by the Special Master
26 on January 12, 2009, and was subsequently signed by the District
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1 Court on January 15, 2009, and was then electronically filed on
2 January 20, 2009. An Objection to the Special Master's Report and
3 Recommendation was filed by the SNHD and those issues are now
4 before the District Court in Department XIX for review and
5 decision.¹

6 ARGUMENT

7 The briefing on this issue has raised multiple discovery
8 questions, many of which will have to be answered at a later time.
9 The scope of the Motion to Compel, and thus the scope of the
10 Special Master's Report and Recommendations, is limited. The
11 Defendants, inter alia, sought to have the SNHD produce the
12 documents they had previously promised to produce. Further,
13 Defendants sought the production of specific documents identified
14 in the deposition of the SNHD's Chief Investigator, Mr. Brian
15 Labus. In addition, Defendants also wanted the SNHD to serve the
16 Defendants with: (1) a specific list of documents it would
17 produce; (2) what documents it would not produce; and (3) an
18 explanation as to the documents it would not produce. In the
19 middle of these discovery disputes, it should be noted that the
20 SNHD changed counsel from in-house counsel, Mr. Stephen Minagil,
21 to outside retained trial counsel from the law firm Marquis &
22 Aurbach.
23
24

25
26 1. The chronology of events set forth in this paragraph is not complete, nor is it
27 intended to be. It is at best a brief and possibly inaccurate summary of the
28 background on how these discovery issues were presented to the District Court
for decision.

1 At the outset, there seems to be some confusion about
2 which Subpoena Duces Tecum propounded by the Defendants to SNHD is
3 still in effect. To be clear, all Subpoenas Duces Tecum
4 propounded by the Defendants to SNHD are hereby QUASHED. Any such
5 Subpoena in the future must be supplied in draft to the Special
6 Master for review and approval before being served.

7
8 It is to be noted that the SNHD has already produced, in
9 two prior productions, a total of (160) documents. The SNHD is
10 "strongly encouraged" to continue to produce any and all documents
11 other than those that have a distinct privilege as set forth by
12 Statute and by this Decision and Order.²

13 The SNHD has argued that it need not produce any patient
14 specific documents, nor any documents previously agreed to be
15 produced by Mr. Minagil which have not been produced, nor any
16 documents which the SNHD has termed to be either confidential or
17 privileged.

18 The first justification for SNHD's position is the
19 "Official Information Privilege" set forth in the provisions of
20 NRS 49.285. The Special Master ruled that so long as
21 "interviewed" patients or "interviewed" individuals were protected
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23
24
25 2. The terminology "strongly encouraged" is a judicial euphemism for "just do it
26 now" and in so doing, retain flexibility to make decisions on what is and what is
27 not privileged. Simply throwing a uniform cloak over all documents and
28 declaring everything to be confidential may well result in an Order from this
Court to produce most, if not all, of the investigative files that relate to the
Hepatitis C investigation.

1 through redaction of personal information on the documents, or by
2 other means, that the provisions of NRS 49.285 were not a
3 sufficient basis to deny production of the documents. In
4 addition, the Special Master pointed out that the production of
5 these documents involved non-patient specific information.
6 Lastly, he noted that the "Public Officer" referred to in
7 NRS 49.285 had not been sought for examination and that the SNHD
8 had not established that the "public interest would suffer by the
9 disclosure."
10

11 This Court agrees in principle with the Special Master's
12 Recommendation but for slightly different reasons. The "Official
13 Information Privilege" as set forth in NRS 49.285 is essentially
14 a very limited privilege. The language appears in Title IV, of
15 the Nevada Revised Statutes, under the heading "Witnesses and
16 Evidence". The actual language appears in Chapter 49. Under this
17 Section denoted as "Privileges" the exact title of this Section
18 is "Public Officer as a Witness." In simple terms, this is an
19 Evidence Code Section and deals with a privilege that Public
20 Officers can exert to prevent themselves from being asked to
21 testify in trial as to certain communications deemed to be made in
22 official confidence when the public interest would suffer by the
23 disclosure. Stated another way, this Section deals with the
24 communications that a public officer can be cross-examined on as
25 he or she sits in the witness box. This litigation is in the
26 discovery stage. The issue presented to this Court for decision
27 is a discovery decision. The privilege set forth in NRS 49.285 is
28

1 a trial decision that deals specifically with what evidence can be
2 made public by an Official from the SNHD testifying at trial.
3 This may well be an issue to be taken up later in this litigation
4 but it does not apply at this stage.

5 The SNHD has also argued that most, if not all, of the
6 documents, non-patient specific or otherwise, that have not
7 already been produced by the prior disclosures of the SNHD are
8 protected under the "Deliberative Process Privilege." The
9 recommendation of the Special Master was that the "Deliberative
10 Process Privilege" did not apply to any documents already utilized
11 by the SNHD in producing interim reports and prior public
12 statements. His reasoning was that any documents or information
13 which had been relied on by the SNHD in producing interim reports
14 and statements were no longer deliberative and, therefore, did not
15 come within the privilege. The Special Master's view that any
16 reports or similar documents utilized by Mr. Labus in
17 "deliberating for a work in progress" did not remove the
18 discoverability which had already been established by the
19 conclusions reached in the reports and statements.
20

21 The Special Master's Report and Recommendation did not
22 deal with the precise question of whether non-patient specific
23 documents which were utilized by the SNHD in originally producing
24 the interim reports and public statements were cloaked with a
25 "Deliberative Process Privilege" before the interim reports and
26 public statements were issued. The Special Master's Report
27 indicated that since the interim report and public statements have
28

1 already been issued, whatever privilege existed with these
2 documents no longer exists and ruled that they should be produced.

3 It should be noted at the outset of the discussion on
4 the "Deliberative Process Privilege" that the final report on the
5 Hepatitis C investigation has not yet been prepared nor released.
6 Everyone in this litigation is waiting for it to be finalized and
7 published. Also, the "Deliberative Process Privilege" for
8 government officials comes from the common law and is identified
9 and described in Nevada Case Law. See DR Partners vs. Board of
10 County Commissioners, 160 Nev. 616 (Nev. 2000). This privilege,
11 as with any privilege, raised by either Common Law or the Evidence
12 Code must be interpreted and applied narrowly. To be protected by
13 this privilege, the documents sought must be "pre-decisional and
14 deliberative." Thus, out of necessity, the documents must point
15 to an agency decision or policy in which they were considered and
16 the documents must contain opinions, recommendations or advice
17 about agency policies.
18

19 DECISION

20 After careful consideration, it is this Court's Decision
21 that the non-patient specific documents which the SNHD wishes to
22 withhold are indeed protected by the "Deliberative Process
23 Privilege" so long as the final report has not been finalized and
24 released. This Court disagrees with the Special Master's opinion
25 that any documents relied on by the SNHD to produce an interim
26 report or public statements have lost whatever "Deliberative
27 Process Privilege" they may once have held. The documents in
28

1 question, to this Court's satisfaction, are "pre-decisional and
2 deliberative."

3 Counsel for SNHD has made it clear that the Department is in the
4 process of formulating its final report. There are currently
5 thousands of documents, including health records, questionnaires,
6 investigative reports, interview notes, etc. that have been
7 gathered by the SNHD in investigating the Hepatitis C Outbreak.

8 Any documents which the SNHD deems to be pre-decisional,
9 deliberative, pointing to an agency decision or report or policy,
10 and consisting of opinion, recommendation or advice about agency
11 policies are protected and need not be produced. Any non-patient
12 specific documents that do not fall into one of these categories
13 and are not protected under other State and/or Federal Statutes
14 must be produced. As earlier stated, the SNHD is encouraged to
15 protect only those documents that are absolutely privileged and
16 confidential. The Court also notes that the process of deciding
17 which documents will and will not fall under the "Deliberative
18 Process Privilege" is inherently disruptive and until the final
19 report is produced and disseminated, the SNHD is directed to not
20 take any extraordinary measures to gather, review or catalogue
21 them.
22

23
24 The Defendants have argued strenuously, and the Special
25 Master agreed, that prior counsel for SNHD had waived any
26 "privilege" which may have applied to these non-patient specific
27 documents. This Court is well aware of the exact provisions of
28 NRS 49.385, which constitute the waiver of privilege by voluntary

1 disclosure. The Court has also read the letter dated August 5,
2 2008, produced by SNHD counsel Stephen Minagil, addressed to
3 Daniel B. Curriden, counsel for Defendants. A careful, word-for-
4 word reading of Mr. Minagil's letter does not indicate a wholesale
5 waiver of the privileges which the SNHD now wishes to raise in
6 this matter. Mr. Minagil agrees in the letter that he is going to
7 gather e-mails and correspondence from employees other than Mr.
8 Labus. He then indicates that by August 15, 2008, he anticipates
9 having sufficient information to respond regarding the production
10 of e-mails and correspondence. This language does not constitute
11 a waiver. In another paragraph within that same letter, Mr.
12 Minagil indicates that once the final report is completed Mr.
13 Labus will then print, categorize and review e-mails for
14 production. However, this is a "conditional" waiver. The
15 conditions are: (1) that this will be done once the final report
16 is completed which is not the case now, and (2) the e-mails will
17 be produced if they do not contain personal health information.
18 This is nothing but a conditional waiver and the conditions have
19 not yet occurred.
20

21 In yet another paragraph within the same letter, Mr.
22 Minagil indicates that he will produce a printout of all documents
23 on the SNHD's Sharepoint portal Cite. He agrees to produce that
24 printout so long as it does not contain personal health
25 information. Furthermore, the information on the Sharepoint
26 portal cite is not without certain protections, as outlined in NRS
27 441A.220 and the Nevada Administrative Code (NAC) 441A.115. The
28

1 definition of "information of a personal nature" is expansive and
2 to some degree comes within the discretionary authority of the
3 SNHD. The protection afforded to the confidentiality of such
4 information is significant. Such information "must not be
5 disclosed to any person under any circumstances, including
6 pursuant to any Subpoena, Search Warrant, or discovery
7 proceedings" with some exceptions. See NRS 441A.220. Any
8 information which is so sensitive and so confidential that it is
9 protected from a Court ordered Subpoena, a Court ordered Search
10 Warrant, or any other discovery proceeding is indeed protected
11 information.
12

13 In essence, this Court is of the opinion that Mr.
14 Minagil did not commit to a wholesale waiver of the privileges
15 which new counsel for the SNHD now wishes to assert. The SNHD is
16 cautioned once again not to use the Court's opinion in this matter
17 as an all encompassing cloak to smother all production of any
18 documents it holds within its files.

19 In accordance with the size and importance of this
20 litigation currently pending in the Eighth Judicial District
21 Court, it is important that the SNHD continues to supply privilege
22 logs regarding the documents sought in Items 1, 2, 9, 10 and 11 as
23 set forth in a letter from Defendants' counsel V. Andrew Cass,
24 dated December 4, 2008.


25 The Court adopts the recommendation of the Special
26 Master that any documents produced by the SNHD should initially be
27 produced and sent to representative counsel for Plaintiffs for
28

1 review to allow Plaintiffs to assert any privilege as to these
2 documents prior to them being released to other parties.

3 ORDER

4 The Objections to the Special Master's Report and
5 Recommendations, as raised by the SNHD, are **APPROVED IN PART** and
6 **DENIED IN PART**, as set forth above.

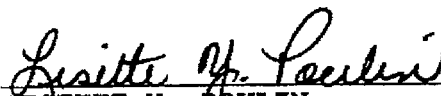
7 IT IS SO ORDERED this 6TH day of April, 2009.
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11 
12 ALLAN R. EARL,
13 DISTRICT COURT JUDGE-DEPT. XIX
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on the 6th day of April, 2009, I directed DAVID SORENSEN, Department XIX Law Clerk, to take the foregoing DECISION AND ORDER to the Clerk's Office to be e-filed and served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST


LISETTE Y. BOULIN,
JUDICIAL EXECUTIVE ASSISTANT,
DEPARTMENT XIX